

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN RE:

NOBLE ARNOLD CRAFT and
JUNELL ELAINE CRAFT,

DEBTORS.

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CASE NO. 03-48703-DML-11

CHAPTER 11

MEMORANDUM OPINION AND ORDER

Came on to be considered the Objection to Proof of Claim No. 14 of the State of Texas (the "Objection") filed by Noble Arnold Craft and Junell Elaine Craft ("Debtors") on October 29, 2004 and the State's Response to Debtors' Objection to Proof of the Claim of the State (the "Response") filed by the State of Texas (the "State"). The court held a hearing on the Objection on November 29, 2004 at which Gary Norton ("Norton"), an Assistant Attorney General of the State, testified in support of the State's Proof of Claim. At the conclusion of the hearing, the court estimated the State's claim at a value of \$800,000.00 for the limited purpose of inclusion in the disclosure statement to be filed in Debtors' case and instructed that such estimation would not be binding for purposes of confirmation of or distribution under any plan of reorganization filed by Debtors. The court took this matter under advisement reserving final ruling on the value of the State's claim and instructed the parties to submit post-hearing briefs. Both parties have submitted post-hearing briefs and the court has considered the same.

This matter is subject to the court's core jurisdiction. 28 U.S.C. §§ 1334(a) and 157(b)(2)(B). This memorandum opinion and order comprises the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

I. BACKGROUND

Debtors operated a number of cash back advertising businesses (the “Cash Today Entities”).¹ On or about March 29, 1999, Today Publishing, Inc., Cash Today of Denton, Inc., Cash Today of Texas, Inc. and Cash Today of the USA, Inc. filed suit in the 353rd Judicial District Court in Travis County, Texas against Leslie Pettijohn and the Office of Consumer Credit Commissioner (the “State Court Litigation”) seeking a declaratory judgment regarding the plaintiffs’ cash back advertising businesses. On or about May 12, 1999, the defendants filed counterclaims in the State Court Litigation. The State was added to the State Court Litigation as a third party plaintiff. The remaining Cash Today Entities, Debtors, Kyle Wayne Hill d/b/a Cash Box (“Hill”) and Richard Simco d/b/a Cash Now and Cash One (“Simco”) were added as third party defendants. The defendants and the State asserted in the State Court Litigation that the cash back advertising businesses of the plaintiffs and third party defendants violated provisions in the Texas Finance Code prohibiting usurious loans, violated the Texas Deceptive Trade Practices Act and violated the Texas Debt Collection Practices Act.

The State Court Litigation was resolved by the entry of an Agreed Permanent Injunction and Final Judgment Incorporating Compromise Settlement Agreement (the “Agreed Judgment”) on December 16, 1999. The Agreed Judgment provided, *inter alia*, that the State have judgment against the Cash Today Entities, jointly and severally, in the

¹ Although not entirely clear from the record before the court, it appears that Debtors had interests in the following business entities: Today Publishing, Inc., Cash Today of Denton, Inc., Cash Today of Texas, Inc., Cash Today of the USA, Inc., Cash Today, Inc., Cash Today of West Texas, Inc., Cash Today of Far West Texas, Inc., Cash Today of San Angelo, Inc., Cash Today of Central San Antonio, Inc., Cash Today of San Antonio, Inc., Cash Today of Bryan, Inc., Cash Today of Pasadena, Inc., Cash Today of Houston Astro, Inc., Cash Today of Waco, Inc., Cash Today of West Fort Worth, Inc., Cash Today of Irving, Inc., Cash Today of Odessa, Inc., Cash Today of Corpus Christi, Inc., Cash in Minutes, Inc., Cash Club Sales of Texas, Inc., Title Mart, Inc. and Cash Boys, Inc.

amount of \$1,000,000.00. The Agreed Judgment further provided that the State would have judgment against third party defendant Hill in the amount of \$53,571.00 and third party defendant Simco in the amount of \$125,000.00. The Agreed Judgment also provided that any satisfaction received by the State from either Hill or Simco would be applied toward satisfaction of the \$1,000,000.00 judgment against the Cash Today Entities, the Agreed Judgment explicitly stating that the intent of the Agreed Judgment was that the State would recover a total of no more than \$1,000,000.00 from all parties.

Debtors were not named in the Agreed Judgment as judgment debtors. Rather, Debtors (along with the other parties to the State Court Litigation) entered into a Compromise Settlement Agreement (the "Settlement Agreement") which was incorporated into the Agreed Judgment. In the Settlement Agreement, Debtors promised and unconditionally guaranteed payment of all amounts due under the Agreed Judgment. The Settlement Agreement also provided that the State would be entitled to recover from Debtors its reasonable attorney's fees and expenses necessary to enforce Debtors' guarantee.

On July 16, 2000, Debtors defaulted by failing to pay amounts due under the Agreed Judgment and Settlement Agreement in accordance with the schedule for payments established by the Settlement Agreement. On or about November 12, 2002, the State filed suit against Debtors in the 200th Judicial District Court in Travis County, Texas (the "Guarantee Suit") seeking enforcement of Debtors' guarantee. Prior to any judgment being rendered in the Guarantee Suit, that litigation was stayed when Debtors filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on September 9, 2003 (the "Petition Date").

On March 5, 2004, the State filed its Proof of Claim in Debtors' bankruptcy case asserting a claim in the total amount of \$1,004,808.47, such amount being comprised of three components. First, \$624,156.52 is requested as the principal unpaid amount, as of the Petition Date, of the \$1,000,000.00 awarded the State in the Agreed Judgment, and the parties agree to the accuracy of this figure. Second, the State seeks recovery of \$196,651.95 in prejudgment interest accruing from the date of Debtors' default under the Settlement Agreement to the Petition Date. Third, the State seeks payment in the amount of \$184,000.00 on account of its attorney's fees and expenses in connection with the Guarantee Suit.² On October 29, 2004, Debtors filed their Objection to the State's Proof of Claim alleging that the State is not entitled to any interest on its claim, that the Proof of Claim was insufficient as filed because the State's attorney's fees records were not attached thereto³ and that the State's attorney's fees were incurred in matters unrelated to enforcement of Debtors' guarantee and/or were not reasonable.

II. DISCUSSION

The issues presented to the court for resolution of Debtors' Objection to the State's Proof of Claim are: (1) whether the State is entitled to interest on its claim; and (2) to what extent, if any, is the State entitled to recover attorney's fees as part of its Proof of Claim.

A. The State is not Entitled to Recover Interest on its Claim

² The time records admitted into evidence reflect time spent by multiple professionals and staff members of the Office of the Attorney General for the State. However, Norton testified at the hearing that the request for fees and expenses in the State's Proof of Claim is based solely on his time of 736 hours at the rate of \$250 per hour.

³ The State provided a copy of its attorney's fees record to Debtors prior to the hearing, thus Debtors did not pursue at the hearing the allegation that the Proof of Claim was insufficiently documented.

The Classification of Claims-Supplement filed with the State's Proof of Claim, which identifies the three components of the State's total claim amount, specifically refers to the interest sought as pre-judgment interest. However, both Debtors' Objection and the State's Response raise the issue of whether the State is entitled to the amount claimed for interest in the form of post-judgment interest. The court will therefore address whether the State is entitled to interest either in the form of pre-judgment or post-judgment interest.

1. Post-Judgment Interest

No provision is made in either the Agreed Judgment or Settlement Agreement for recovery of post-judgment interest and Debtors were not named in the Agreed Judgment as Judgment Debtors. Norton also testified that the State's Proof of Claim is based solely on the Guarantee Suit, not the Agreed Judgment. Nevertheless, the State argues that it is entitled to post-judgment interest because the Agreed Judgment's silence on the issue does not preclude an award of post-judgment interest, and Debtors unconditionally guaranteed payment of all obligations arising under the Agreed Judgment.

Even assuming the State is entitled to post-judgment interest on the Agreed Judgment, despite the lack of provision for the same in that document, the State may not recover it from Debtors. Because the Agreed Judgment is silent with respect to post-judgment interest, the court concludes that an award of such cannot constitute an *obligation* under the Agreed Judgment which the Debtors may be held responsible for pursuant to their guarantee in the Settlement Agreement. Furthermore, the court would note that in the State's First Amended Original Petition⁴ in the Guarantee Suit, the State

⁴ The State's First Amended Original Petition was included as Exhibit "C" to the State's Proof of Claim when filed.

does not request an award of post-judgment interest based on the Agreed Judgment and the Debtors' guarantee of all obligations arising thereunder, but alleges only that "[t]he State is entitled to recover postjudgment interest . . . as a matter of law on the total amount of the judgment *in this action* from the date of the judgment until paid." Plaintiff's First Amended Original Petition, p. 6, ¶ 4.10 (emphasis added).

2. Pre-Judgment Interest

The State argues that it is entitled to recover pre-judgment interest in connection with the Guarantee suit as a component of its Proof of Claim because pre-judgment interest is a measure of damages under the common law of Texas, and Debtors' default under the Settlement Agreement constitutes a breach of contract. The State relies on *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507 (Tex. 1998) in which the Supreme Court of Texas stated that "[p]rejudgment interest is 'compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment'." *Id.* at 528 (quoting *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985)). Debtors argue, and the court agrees, that a strict reading of *Johnson & Higgins* precludes an award by this court of the pre-judgment interest the State requests.

The State shall have as its claim against Debtors' bankruptcy estate that which it was entitled to recover against Debtors as of the Petition Date. As of the Petition Date, the Guarantee Suit, upon which the State bases its claim, had not proceeded to trial and no judgment had been rendered. As stated by the Supreme Court of Texas, pre-judgment interest is computed between the time of accrual of a claim and the point at which judgment on the claim is rendered. Thus, the court reads *Johnson & Higgins* as requiring

the entry of a judgment on a claim as a condition precedent to entitlement to pre-judgment interest on the claim itself. Because the State had not obtained a judgment in its favor on the Guarantee Suit as of the Petition Date, the State was not entitled to pre-judgment interest at that moment in time, and because the Petition Date is the date of cleavage for determination of what the State's claim against Debtors' estate comprises, the State's claim cannot include as a component that which it was not entitled to on the Petition Date. Furthermore, the court does not view its determination that the principal amount owing under the Agreed Judgment is a valid component of the State's claim as constituting a "judgment" on the Guarantee Suit that may be retroactively affixed to the Petition Date to justify an award of pre-judgment interest to the State.

B. State's Entitlement to Attorney's Fees

1. The State's Attorney's Fees Were Reasonable

Debtors allege in their pleadings that the State's attorney's fees requested as a component of its Proof of Claim were not reasonable. Norton testified at the hearing regarding the reasonableness of the fees and the court finds his testimony credible. No other evidence was presented by Debtors indicating that any of the attorney's fees incurred by the State were unreasonable or excessive. Therefore, the court concludes that the attorney's fees incurred by the State were reasonable.

2. The State is Entitled to Recover Only its Attorney's Fees Incurred in Connection with the Guarantee Suit

The State seeks \$184,000.00 in its Proof of Claim on account of attorney's fees incurred in the enforcement of Debtors' guarantee. Debtors do not dispute that the Settlement Agreement entitles the State to recover its reasonable attorney's fees related to enforcement of the guarantee, but argue that a portion of the attorney's fees sought by the

State were incurred on matters unrelated to enforcement of the guarantee. The court agrees that a number of entries for fees on the record provided by the State are unrelated to the Guarantee Suit and may not be allowed as part of the State's claim. Specifically, the court finds that certain time entries reflecting work in the following matters are, on their face, not related to the Guarantee Suit:

- 1) Post-judgment discovery matters involving the Cash Today Entities;⁵
- 2) Post-judgment discovery matters and communications regarding Hill and Simco;⁶
- 3) Work and communications involving the bankruptcies of the Cash Today Entities including, *inter alia*, preparation for Rule 2004 examinations;⁷

⁵ The court concludes that a total of 74 hours and 15 minutes spent by Norton in this category were unrelated to enforcement of Debtors' guarantee. This total is comprised on entries made on the following days and in the following total amounts for such day: November 12, 2002 (45 minutes), November 13, 2002 (6 hours), November 14, 2002 (7 hours, 15 minutes), November 15, 2002 (5 hours), November 18, 2002 (2 hours, 15 minutes), November 19, 2002 (1 hour, 15 minutes), November 20, 2002 (1 hour, 30 minutes), November 21, 2002 (45 minutes), November 22, 2002 (30 minutes), November 25, 2002 (2 hours, 15 minutes), November 26, 2002 (4 hours, 15 minutes), November 27, 2002 (1 hour, 45 minutes), December 2, 2002 (5 hours, 45 minutes), December 4, 2002 (3 hours, 30 minutes), December 5, 2002 (2 hours, 45 minutes), December 6, 2002 (3 hours, 15 minutes), December 13, 2002 (10 hours), December 14, 2002 (45 minutes), December 16, 2002 (7 hours, 45 minutes), December 17, 2002 (2 hours, 15 minutes), January 2, 2003 (1 hour, 30 minutes), January 29, 2003 (1 hour, 45 minutes), January 31, 2003 (45 minutes), March 20, 2003 (15 minutes) and September 3, 2003 (30 minutes).

⁶ The court concludes that a total of 12 hours and 45 minutes spent by Norton in this category were unrelated to enforcement of Debtors' guarantee. This total is comprised on entries made on the following days and in the following total amounts for such day: December 17, 2002 (1 hour, 30 minutes), January 14, 2003 (45 minutes), January 15, 2003 (2 hours, 45 minutes), February 12, 2003 (15 minutes), March 3, 2003 (30 minutes), March 18, 2003 (45 minutes), March 19, 2003 (45 minutes), March 24, 2003 (15 minutes), April 8, 2003 (15 minutes), April 11, 2003 (15 minutes), April 23, 2003 (15 minutes), April 24, 2003 (30 minutes), April 28, 2003 (15 minutes), May 6, 2003 (15 minutes), May 8, 2003 (15 minutes), May 29, 2003 (15 minutes), June 2, 2003 (15 minutes), July 31, 2003 (15 minutes), August 1, 2003 (15 minutes), August 4, 2003 (45 minutes), August 5, 2003 (30 minutes), August 11, 2003 (30 minutes), August 20, 2003 (15 minutes) and August 29, 2003 (15 minutes).

⁷ The court concludes that a total of 27 hours and 30 minutes spent by Norton in this category were unrelated to enforcement of Debtors' guarantee. This total is comprised on entries made on the following days and in the following total amounts for such day: January 21, 2003 (15 minutes), March 14, 2003 (15 minutes), March 18, 2003 (2 hours), March 24, 2003 (1 hour, 30 minutes), March 25, 2003 (5 hours, 45 minutes), March 26, 2003 (2 hours, 15 minutes), March 27, 2003 (30 minutes), March 28, 2003 (1 hour, 45 minutes), March 31, 2003 (1 hour), April 1, 2003 (3 hours,

- 4) Communications regarding class action proceedings against the Cash Today Entities and Debtors;⁸ and
- 5) Work involving consumer complaints regarding the Cash Today Entities.⁹

Entries in the above categories which the court concludes were not related to enforcement of Debtors' guarantee total 120 hours and 45 minutes. Therefore, the amount of the attorney's fees component of the State's claim must be reduced by charges for this time, \$30,187.50, leaving a total of \$153,812.50 in attorney's fees which are properly included in the State's Proof of Claim.

III. CONCLUSION

For the foregoing reasons, Debtors' Objection to the State's Proof of Claim is hereby SUSTAINED IN PART and OVERRULED IN PART and it is hereby ORDERED the State's claim against Debtors' bankruptcy estate is allowed in the amount of \$777,969.02.

Signed this 12 day of January, 2005.


DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

45 minutes), April 2, 2003 (45 minutes), April 4, 2003 (1 hour, 15 minutes), April 10, 2003 (15 minutes), April 15, 2003 (15 minutes), April 30, 2003 (30 minutes), May 23, 2003 (15 minutes), May 27, 2003 (30 minutes), July 16, 2003 (15 minutes), July 24, 2003 (15 minutes), July 28, 2003 (1 hour, 15 minutes), July 29, 2003 (30 minutes), July 30, 2003 (1 hour), August 4, 2003 (30 minutes), August 5, 2003 (15 minutes) and August 7, 2003 (45 minutes).

⁸ The court concludes that a total of 4 hours and 30 minutes spent by Norton in this category were unrelated to enforcement of Debtors' guarantee. This total is comprised on entries made on the following days and in the following total amounts for such day: March 3, 2003 (15 minutes), April 2, 2003 (15 minutes), April 8, 2003 (30 minutes), May 9, 2003 (15 minutes), July 9, 2003 (15 minutes), July 31, 2003 (2 hours, 15 minutes) and August 5, 2003 (45 minutes).

⁹ The court concludes that a total of 1 hour and 45 minutes spent by Norton in this category were unrelated to enforcement of Debtors' guarantee. This total is comprised on entries made on the following days and in the following total amounts for such day: June 3, 2003 (1 hour, 15 minutes) and September 8, 2003 (30 minutes).